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No. 03-290

In the Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,
PETITIONER

v.

TERRY CAMPBELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

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QUESTIONS PRESENTED

1. Whether the court of appeals or the Department of Labor's Benefits Review Board improperly reweighed the evidence in reviewing an administrative law judge decision regarding a claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

2. Whether the existence *vel non* of suitable alternative employment for an injured claimant is a proper subject of modification proceedings under 33 U.S.C. 922.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 2a-8a, 10a-12a) are not published in the *Federal Reporter* but are *reprinted in* 59 Fed. Appx. 568 and 55 Fed. Appx. 178. The decisions of the Benefits Review Board (Pet. App. 13a-18a, 35a-46a, 61a-73a, 87a-96a) and the administrative law judge (Pet. App. 19a-34a, 47a-60a, 74a-86a, 97a-145a) are unreported.

JURISDICTION

The court of appeals entered its judgment on March 11, 2003. A petition for rehearing was denied on May 21, 2003 (Pet. App. 1a). The petition for a writ of

certiorari was filed on August 19, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, provides compensation for work-related injuries that result in the disability or death of covered employees engaged in maritime work. 33 U.S.C. 902(3), 903. Disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). Compensable disabilities under the Act may be either total or partial, and either permanent or temporary. 33 U.S.C. 908.

Administrative law judges hear and decide contested LHWCA claims. 33 U.S.C. 919(d). Appeals are considered initially by the Benefits Review Board (BRB or Board), which must affirm the ALJ's findings of fact "if supported by substantial evidence in the record considered as a whole." 33 U.S.C. 921(b)(3). Board decisions, in turn, are reviewed by the courts of appeals for errors of law and to assure that the Board adhered to the substantial evidence standard when it reviewed the decision of the ALJ. 33 U.S.C. 921(c); *Norfolk Shipbuilding & Drydock Corp.* v. *Faulk*, 228 F.3d 378, 385 (4th Cir. 2000), cert. denied, 531 U.S. 1112 (2001).

Final decisions on LHWCA claims are also subject to modification "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. 922; see generally *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291 (1995).

2. Respondent Terry Campbell seriously injured his head, neck, and back in May 1987, while working as a rigger for petitioner Norfolk Shipbuilding and Drydock Company. Pet. App. 3a, 113a-114a. Petitioner volun-

tarily paid Campbell temporary total disability benefits for several years, then partial disability benefits when he returned to work part-time in petitioner's light-duty shop in October 1992. *Id.* at 3a, 114a-115a. In January 1993, petitioner fired him for violating a company rule requiring him to call in when absent, and suspended payment of LHWCA benefits. *Id.* at 3a, 113a. Campbell then filed a claim for temporary total disability. *Id.* at 3a. Although Campbell worked briefly for another employer during the last three months of 1993; he has not worked since that time. *Id.* at 14a, 116a-117a.

After his injury, Campbell suffered from recurring, severe vascular headaches similar to migraines, as well as neck pain and spasms. Pet. App. 124a-125a. His treating physician and neurologist, Dr. Suter, described the headaches as post-traumatic in origin. *Ibid.* To control his symptoms, he was prescribed a number of pain medications and muscle relaxants, some of which caused drowsiness and interfered with his ability to drive and to work. *Id.* at 115a, 126a-127a.

Dr. Suter advised the shipyard medical director in 1992 that Campbell could do part-time light-duty work, with no hand-held equipment, heavy lifting, or driving, although he might miss some days due to headaches. Pet. App. 126a-127a. Despite those restrictions, Campbell's light-duty job at the shipyard required him to use hand-held equipment such as pliers, screwdrivers, and a drill, as well as to bend and lift heavy extension cords. *Id.* at 92a-93a, 115a, 119a.

Both Dr. Suter and Dr. Dvorak, an Iowa physician who evaluated Campbell's condition when respondent was seeking social security disability benefits, concluded that Campbell was totally disabled from gainful employment. Pet. App. 56a, 76a-78a. The Social Secu-

rity Administration granted Campbell disability benefits from the date of his injury. *Id.* at 105a.

An administrative law judge (ALJ) initially ruled that Campbell was not entitled to disability benefits under the LHWCA. Pet. App. 111a-145a. The ALJ found that, while Campbell's injury precluded his return to his former job, petitioner had provided him with suitable alternative employment in its light duty shop, so he was not totally disabled. *Id.* at 134a-144a. Citing *Brooks* v. *Director, OWCP*, 2 F.3d 64 (4th Cir. 1993), the ALJ concluded that Campbell forfeited his entitlement to benefits when he was terminated from that employment for violating a neutral company work rule. Pet. App. 143a-144a.

Campbell subsequently requested modification of the ALJ's decision under Section 22 of the Act, 33 U.S.C. 922, which permits modification "on the ground of a change in conditions or because of a mistake in a determination of fact." Campbell claimed that the ALJ's decision was mistaken on the issue of extent of disability. The ALJ denied Campbell's request, holding that Campbell failed to establish either a change in conditions or a mistake in a determination of fact. Pet. App. 97a-110a. In particular, the ALJ determined that Dr. Suter's opinions regarding the claimant's condition did not warrant modification because "Dr. Suter has given inconsistent opinions regarding the extent of Claimant's disability." *Id.* at 107a.

The BRB vacated and remanded the ALJ's denial of modification. Pet. App. 87a-96a. The Board affirmed the ALJ's conclusion that Campbell had not demonstrated a change in his condition since the first hearing, *id.* at 91a-92a, but the Board held that the ALJ "erred in his evaluation of the evidence of record" regarding a possible mistake of fact in determining the suitability of

Campbell's post-injury employment, *id.* at 92a. The Board explained that the evidence was undisputed that Campbell's light-duty job required him to perform tasks beyond his medical restrictions, and that performing those tasks gave him headaches. *Id.* at 92a-93a. The Board also found (*id.* at 93a-94a) that:

> Contrary to the [ALJ's] statement, Dr. Suter's testimony is not inconsistent; rather, Dr. Suter's change of opinion in 1994 regarding claimant's ability to work, and his restatement of that opinion in 1996, takes into consideration his ongoing treatment of claimant and reflects the progression of this diagnoses [*sic*] of claimant's condition subsequent to his work-injury.

The Board also noted that the ALJ had failed to consider the report of Dr. Dvorak, and failed to determine whether, if the light-duty job was suitable, Campbell remained entitled to partial disability benefits. Pet. App. 95a-96a n.2. The Board remanded to the ALJ "to re-consider the totality of the evidence of record regarding the issue of [Campbell's] ability to perform the light-duty position at [petitioner's] facility." *Id.* at 94a.

On remand, the ALJ "re-evaluated the totality of record evidence" and found that Campbell has a permanent total disability and that his light-duty job with petitioner required him to work "outside his medical restrictions, which specifically prohibited him from using hand-held equipment." Pet. App. 76a-79a. The ALJ concluded that "since [Campbell] was fired from a job that was never suitable alternate employment, [petitioner] has not met its burden of showing that suitable alternative employment was available." *Id.* at 81a. As a result, the ALJ held that Campbell was entitled to LHWCA benefits for permanent total dis-

ability, *id.* at 84a. The BRB affirmed the ALJ's decision. *Id.* at 61a-73a.

3. The court of appeals affirmed in a per curiam unpublished decision. Pet. App. 2a-8a. The court held that Campbell's claim of mistake as to the extent of his disability "is clearly of a factual nature" and thus was "properly raised and reviewed on appeal" in a proceeding under Section 22 of the Act. *Id.* at 4a-5a. The court further rejected petitioner's assertion that the BRB improperly reweighed the evidence in vacating the ALJ's denial of modification. *Id.* at 5a-7a. The court explained that "the BRB properly vacated the ALJ's decision because the ALJ failed to consider all the evidence of record and because the ALJ's determination that Dr. Suter's opinion was contradictory was not supported by substantial evidence." *Id.* at 6a.

ARGUMENT

The court of appeals held in an unpublished decision that the BRB properly remanded a matter to the ALJ because his determination was not supported by substantial evidence. That fact-bound holding is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. Petitioner contends (Pet. 11-22) that the court of appeals and the BRB improperly reweighed the medical evidence on the extent of Campbell's disability. That is not correct. As the court of appeals explained, "the BRB properly vacated the ALJ's decision because the ALJ failed to consider all the evidence of record and because the ALJ's determination that Dr. Suter's opinion was contradictory was not supported by substantial evidence." Pet. App. 6a. Thus, "[c]ontrary to [petitioner's] assertions, the BRB did not reweigh the evidence or substitute its view of the facts for the view

of the ALJ. Instead, the BRB remanded to the ALJ for him, after consideration of the totality of the evidence, to ultimately determine whether there was a mistake in fact in his original opinion." *Id.* at 6a-7a. This case accordingly differs from *Mijangos* v. *Avondale Shipyards, Inc.*, 948 F.2d 941 (5th Cir. 1991), cited by petitioner (Pet. 20), where the court held that the BRB exceeded its scope of review in rejecting credibility determinations made by an ALJ.

2. Petitioner further contends (Pet. 22-23) that whether an employer has met its burden of showing suitable alternate employment is a purely legal issue that cannot be challenged through modification proceedings under 33 U.S.C. 922. That contention lacks merit. Section 22 modification is available to correct any "mistake in a determination of fact," *ibid.*, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); accord *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 295-296 (1995). Modification is not limited to "particular factual errors, or to cases involving new evidence or changed circumstances." *O'Keeffe*, 404 U.S. at 255; accord *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 465 (1968). As the court of appeals found, Campbell's "claim of mistake is clearly of a factual nature—there was disagreement as to the interpretation of the medical evidence" regarding whether Campbell could perform particular job tasks. Pet. App. 5a. The ALJ on remand therefore properly modified his decision based on a determination that the position offered by petitioner did not constitute suitable alternative employment given Campbell's medical restrictions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

HOWARD M. RADZELY
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
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